**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Fibertech Networks, L.L.C. | ) | RM-11303 |
| Petition for Rulemaking | ) | |
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Comments of COMPTEL

COMPTEL, hereby respectfully submits its comments in response to the above-referenced Petition for Rulemaking ("Petition") of Fibertech Networks, L.L.C. ("Fibertech").[1] In its Petition, Fibertech asks the Commission to adopt certain industry standard practices for pole and conduit access. For the reasons explained below, the FCC should grant Fibertech's Petition, and promptly issue a Notice of Proposed Rulemaking and adopt the rules proposed by Fibertech as industry standards for non-discrimination in the provision of access to utility-controlled poles, ducts, and conduit. The importance of Fibertech's Petition to the Commission's vision for the

[1] COMPTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTEL advances its member's business through policy advocacy and through education, networking and trade shows. COMPTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTEL members share a common objective: advancing communications through innovation and open networks.

development of competition based on different technologies and diverse facilities cannot be overstated. To appreciate the significance of the problems Fibertech identifies, it is helpful to consider Fibertech's Petition in context.

## I. Introduction

The Telecom Act, itself, is pro-competition in the broadest possible sense—in all cases promoting the most economically efficient form of competition that will encourage the most innovation by competitors both in terms of service creation and facilities deployment. In the past few years, the Commission has decidedly de-emphasized, even discouraged, "services competition" over efficiently shared infrastructure in order to ostensibly favor "facilities competition." However, despite the rhetoric from the Commission in recent years, the FCC has not done anywhere near all that it can to promote even "facilities" competition.

COMPTEL and others have explained in the Commission's Special Access Pricing NPRM that significant "demand" side[2] obstacles still exist that prevent efficient fiber-based competitors from successfully competing for Bell-provided access circuits to Internet backbone, CLEC, long-haul, and wireless carriers—despite offering lower priced services at higher service quality. The "demand" side barrier to facilities competition is, of course, the exclusionary Bell discount contracts for special access services. Because only the

[2] By "demand" side barriers, COMPTEL refers to artificial impediments that prevent competitors from capturing sales from otherwise-willing purchasers. In other words, assuming the competitive fiber provider could otherwise provide timely delivery of fiber capacity, these are barriers that artificially limit, or increase the cost of, a prospective purchaser actually transferring demand to the competitive fiber provider.

incumbent can supply all of any wholesale customer's demand across the entire incumbent LEC region, the incumbents condition discounts on "non-competitive" circuits (*e.g.*, DS1s anywhere, or higher-cap circuits in less-dense areas) throughout its region on the customer's commitment to purchase from the Bell circuits that could be more efficiently supplied from competing carriers.[3]

There have always been significant "supply" side entry barriers for firms seeking to deploy new facilities to compete with the incumbent LECs. [4] For example, the ILEC likely secured its initial access to both rights-of-way[5] and commercial buildings[6] on more favorable terms than subsequent entrants can expect to obtain. Moreover, the sunk costs, themselves, that are characteristic of competitive fiber deployment are entry barriers.[7]

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[3] See generally, Reply Declaration of Joseph Farrell on Behalf of CompTel, filed with Reply Comments of CompTel, Global Crossing North America, Inc., and NuVox Communications, *In the Matter of Special Access Rates for Price Cap LECs*, WC Docket No. 05-25, July 29th 2006.

[4] By the term "supply" side barriers, COMPTEL refers to impediments which prevent, or delay, the otherwise-efficient deployment of fiber facilities by competitive carriers. In other words, assuming the competitor has a customer for whom a facilities build would be efficient, these are barriers that artificially delay and/or increase the expense of that deployment by the competitor.

[5] *See generally*, Day, *The Concrete Barrier at the End of the Information Superhighway: Why Lack of Local Rights-of-Way Access Is Killing Competitive Local Exchange Carriers*, 54 Fed. Comm. L.J. 461 (May 2002). *C.f.*, *TCG New York, Inc. v. City of White Plains,* 305 F.3d 67 (2d Cir. N.Y. 2002)(municipal ordinances imposing costs on entrants not borne by incumbents is a barrier to entry and subject to preemption under Section 253 of the Act).

[6] See, *e.g.*, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent* LECs, CC Docket No. 01-338, Letter from Ruth Milkman, on behalf of WorldCom, to Marlene H. Dortch, FCC, dated October 25, 2002 (describing discriminatory terms vis-à-vis incumbents which competitors confront when trying to deploy high capacity facilities to commercial buildings).

[7] The existence of high, or proportionately high, sunk costs is generally recognized as a barrier to entry. *See, e.g.*, Larson, *An Economic Guide to Competitive Standards in Telecommunications Regulation*, 1 CommLaw Conspectus 31, 52 ("if entry requires the incurrence of capital costs, and a 'high' proportion of these are sunk costs for entrants, then

Now Fibertech identifies an additional supply side problem facing those companies that are still willing to risk new capital on the possibility that the Commission will enforce rules that will facilitate its purported policies. The problems identified by Fibertech are "additional" supply side problems, but the problems identified by Fibertech are nowhere near as thorny and politically intractable as the other rights-of-way and building access issues that have plagued the Commission and the industry since 1996. Rather, the problems identified by Fibertech are well within the Commission's authority (responsibility) to address, and the solutions proposed by Fibertech all have precedent in either state regulation or utility practice. Fibertech has presented the FCC with an opportunity to address a supply-side barrier to facilities competition.

The "best practices" proposed by Fibertech are thoroughly explained, imminently reasonable, and urgently needed in order to further promote deregulation, through the development of facilities-based competition (both inter and intra modal). Furthermore, the rulemaking proceeding that Fibertech asks the Commission to initiate will likely produce more complete information about industry practices nationwide and will allow the Commission to adopt a set of standard practices for what constitutes "non-

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entry barriers exist.") *c.f.*, Bolton, Brodley, and Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2265 (August, 2000)("if challenged by new entry, the incumbent will rationally disregard such [sunk] costs in its pricing decisions rather than lose the business. The entrant . . . must now incur such costs, and therefore faces risk of underpricing by an incumbent with sunk costs. Thus, as a result, sunk costs may act as an entry barrier, giving the incumbent the ability to raise price above the competitive level.")

discriminatory" access to poles, ducts, and conduit under Section 224, Section 251(b)(4) and Section 271(c)(2)(B)(iii).

More detailed guidance will be helpful for all utilities subject to Section 224, all LECs under Section 251(b)(4), and will be especially helpful to Bell Operating Companies who will most significantly benefit from clearer compliance guidance, given that they are subject to the enforcement provisions of Section 271(d)(6), which allow for the immediate suspension of their ability to market in-region, interLATA services. Obviously, as more Bell Companies switch more services to Internet-based transmission and delivery systems, even a temporary ban on interLATA marketing could prove devastating to the BOC that violates the competitive checklist. Thus, any "safe harbor" guidance the Commission can provide through the adoption of industry best practices should be embraced by the Bells.

## II. The FCC Should Also Address Enforcement and Remediation in its NPRM on the Fibertech Petition

It is clear that the Commission needs no convincing on the policy value of Fibertech's request for best practices rules, which will facilitate more efficient and faster fiber deployment,[8] and Fibertech, through its Petition and supporting evidence, has certainly shown that rules are *needed* in order to set objectively reasonable expectations for non-discrimination (for the benefit of those who are risking capital to deploy infrastructure which can be

[8] See, *e.g.*, Separate of [Then] Commissioner Kevin J. Martin on the Commission's initiation of a rulemaking for performance measures and standards for the provision of UNEs, 11/19/01. ("To get to true deregulation . . . we need facilities-based competition. Without such competition, we will always need a regulatory body to set wholesale and retail prices."

used by all inter/intra modal providers in competition with the incumbents), and guidelines for compliance (for the benefit of those who have the obligation to administer fair access to the publicly-funded rights-of-way). However, it is on the issue of enforcement and remediation that COMPTEL would like to see the Commission augment the rules proposed by Fibertech.

While COMPTEL unequivocally endorses the adoption of the rules proposed by Fibertech, COMPTEL believes that the FCC must also commit to enforcing these rules—in order to further reduce administrative expense and delay through bad faith litigation by the utility.[9] Furthermore, COMPTEL would encourage the Commission, when adopting the rules proposed by Fibertech, to also adopt certain presumptions regarding liability and remediation, depending on the competitive effect of the discrimination.

### A. The FCC Should Presume that a Failure to Comply with Its Non-Discrimination Rules by any LEC Is a Violation of Section 251(b)(4).

The Commission has previously recognized that a competitor to the requesting carrier is much more likely to have an anticompetitive motive to violate the Section 224 rights-of-way access rules by than other types of utilities:

> [w]e note in particular that a utility that itself is engaged in video programming or telecommunications services has the

[9] See, *e.g.*, Fibertech Petition, Exhibit 1, Declaration of Charles Stockdale at ¶ 15 (describing the difficulty, in terms of time and expense, of resolving pole attachment disputes, because results of adjudications interpreting obligations of utilities are not centrally available or codified).

> ability and the incentive to use its control over distribution facilities to its own competitive advantage.[10]

Thus, in adopting its rules under Section 224, the Commission prohibited utilities from favoring their affiliates over "other parties with respect to the provision of telecommunications or video programming."[11] Section 251(b)(4) reiterates that all LECs, including incumbent LECs, have the obligation to provide access to rights-of-way pursuant to the rates, terms and conditions prescribed under Section 224. Accordingly, a violation by an incumbent LEC of the FCC's rules under Section 224 is also a violation of Section 251(b)(4).

1. **The Presumptive Remedy for a Failure to Provide Timely, Non-discriminatory Access in Violation of Section 251(b)(4) by an ILEC Should Be the Reinstatement of the Obligation to Provide Access Under Section 251(c)(3) to Dark or Lit Fiber Transport on the ILEC's Network**

In its Triennial Review Remand Order, the FCC eliminated all access to dark fiber as a UNE under Section 251(c)(3). The Commission also severely limited access to "lit" transmission UNEs such as DS1 and DS3 loops and transport. The Commission premised its decision, in no small part, on the assumption that competitors would continue to have non-discriminatory access to ILEC-owned rights-of-way.[12] Thus, when an incumbent LEC,

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[10] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, (rel. August 8, 1996) at ¶ 1150.
[11] *Id.* at ¶ 1157.
[12]"We assume for purposes of our analysis that existing conduit is available to competitive carriers that seek to deploy their own transport facilities. All LECs are obligated under sections 251(b)(4) and 224 of the Act to provide access to poles, ducts, and conduit." *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, and *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC

subject to Section 251(c)(3), violates Section 251(b)(4) and 224 of the Act, they have undermined the basis for their own unbundling relief—and the unbundling obligation must return.

Additionally, there is one situation in which *any* failure to provide timely access to conduit by an incumbent LEC should be a presumptive violation of Sections 224 and 251(b)(4). That situation is when the incumbent LEC is the owner of the building for which access to conduit has been foreclosed. In every such instance, access to conduit will have been foreclosed unilaterally by the incumbent (either through "reservation" of capacity for future growth, wasteful use of existing conduit, or a bad faith denial of access to the building for new competitively-owned conduit), who is also benefiting from the elimination of unbundling requirements (at a minimum, the ILEC has no obligation to provide dark fiber loops or transport anywhere). In each such instance, the Commission must take a "*res ipsa*" approach to liability and, in essence, declare that, when the incumbent owns the building and says it can't provide access to conduit, "can't means won't."

### B. The FCC Should Presume that a Failure to Comply with Its Non-Discrimination Rules By a BOC Is a Violation of Section 271(d)(6)

In mandating compliance with the Section 224 rules as part of the Section 271 "competitive checklist," Congress recognized that a failure to provide timely, efficient, and non-discriminatory access to poles, ducts, and

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Docket No. 01-338, *Order on Remand* (rel. February 4, 2005) at ¶ 77 (internal citations omitted).

conduit by a Bell Company was significantly more threatening to competition, and the integrity of the Act, than a violation of Section 224 by a non-competing utility. Indeed, because of the increased incentives of the Bells to intentionally, and strategically, deny or delay access to critical rights-of-way,[13] the Commission should adopt the automatic presumption that any violation of the Commission's rules under Section 224 by a BOC are a presumptively intentional violation of Section 271(d)(6). Thus, once the Commission has determined that a BOC has flaunted its non-discrimination standards under Section 224, the only additional inquiry the FCC should undertake is whether the Bell benefited competitively from its discrimination.

Based on COMPTEL's experience with its members who deploy metro fiber facilities, competitors frequently encounter many situations of the kind described in Paragraph 14 of the Stockdale Declaration. Typically, what can happen is that a large customer will be nearing the end of its Bell access contract, and put its business up for bid with, for example, 3 months left on the contract. A competitor—like a Fibertech (that has to undertake construction)—will bid on the contract and win. However, during the course of completing its build to the customer, the competitor will require some assistance from the Bell. The Bell delays its cooperation and the customer's contract nears expiration. At this point—when it is clear the competitor will not be in a position to provide service when the Bell contract expires—the

[13] See, *e.g.,* Stockdale at ¶¶ 14, 24-25.

Bell will threaten to either disconnect the customer, or dramatically raise the customer's rates, unless the customer agrees to renew the contract (usually for the same 2-3 year original term). Evidence like this—that the Bell has used its intentional violation of the Act for competitive advantage—should give rise to very certain, very specific penalties.

### 1. The Commission Should Presumptively Require Disgorgement of Revenue Obtained from Violations of Section 271(c)(2)(B)(iii)

As part of the NPRM the Commission initiates in response to the Fibertech Petition, the FCC should make it very clear that, in addition to the maximum level of forfeitures, the Commission will also, as a matter of course, award the "consequential damages" authorized under Section 206 (??check) to the aggrieved party using a "disgorgement" theory. Under such a theory, the FCC would make clear that once a requesting carrier has established a 271 violation due to a Bell company's failure to comply with industry non-discrimination standards, all revenue that the Bell is obtaining from any customers the requesting carrier could have served—but for the violations—would accrue to the aggrieved carrier. Such a result is in accord with the "nuclear" option in Section 271(d)(6)(A)(iii) which allows the Commission to revoke the Bell's 271 authority. However, the remedy COMPTEL is suggesting would be more "tactical" and narrowly targeted to only address the unfair advantage the Bell gained from the violation of Section 271.

Moreover, the "disgorgement" remedy does not disrupt any customer service (it would not be fair to the customer for the FCC to prevent the Bell from selling new service if the Bell is preventing a facilities-based alternative from providing service to the customer—a "high end" customer, depending on their service configuration, may be left without any service provider if the FCC completely revoked the Bell's 271 authority), it is fully consistent with a consequential damage theory because the competitor is losing access to the revenues as a result of the Bell's 271 violation, and it does not unjustly enrich the competitor, because the competitor is still incurring network costs as a result of the Bell's failure to provide reasonable access to poles, ducts, or conduit.

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For all the reasons explained by Fibertech, in its Petition and supporting materials, the Commission should expeditiously grant Fibertech's Petition and, for the reasons explained herein, the FCC should expand the scope of its NPRM to address issues of enforcement and remediation.

Respectfully submitted,

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